IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES F. VAN HOUTEN, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 98-CV-0270
HERSHEL GOBER, Acting Secretary, Department of Veteran Affairs, Defendant.	:	

MEMORANDUM AND ORDER

Davis, J. June 6, 2003

MEMORANDUM

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In October, 1993, James F. Van Houten ("Plaintiff") was hired by the Department of Veteran Affairs ("VA") in Philadelphia's Regional Office for a position as a First Notice of Death Clerk, a level GS-3 position (D. Motion, ex. C, at p. 29, herein as "Pl. Dep."). The Plaintiff informed the VA upon his hiring, that he was allegedly disabled due to carpal tunnel syndrome and a cervical condition, and that he was rated as a thirty-percent compensable by the Veteran Administration upon his departure from his prior job with the Pennsylvania Army National Guard (Pl. Dep., at pp. 15, 26, 30). The Plaintiff's position as a First Notice of Death Clerk required him to type notifications of Veterans' deaths, eight hours a day, five days a week, (Pl. Dep., at p. 29), and the repetitive typing motions exacerbated Plaintiff's prior carpel tunnel syndrome, causing a burning sensation in his arms and weakness near his shoulders (Pl. Dep., at p. 30). However, Plaintiff learned to "tough[] it out," and continued to perform his duties as a First Notice of Death Clerk until October 1994 (Pl. Dep., at p. 36).

In October, 1994, the VA announced openings for positions in the Insurance Phone

Specialist training program, a level GS-5 position designed to facilitate insurance sales by the VA to qualified veterans (Pl. Dep., at pp. 37, 42). Plaintiff applied for, and was accepted to the program, and began an intensive six month training program in October 1994 (Pl. Dep., at p. 37). After completing the training classes, Plaintiff expected to be assigned to a position as an Insurance Phone Specialist, a GS-7 position, likely leading to additional promotions (D. Reply, ex. E, at p. 3).

However, Plaintiff claims that because of his carpal tunnel syndrome and his discussions with an EEO Counselor regarding the possibility of receiving accommodations for his impairment from the VA, Plaintiff received disparate treatment from the training class instructors, and that the discord between the Plaintiff and one specific instructor eventually led to Plaintiff's removal from the training sessions. Specifically, on May 11, 1995, the Plaintiff was involved in a dispute with one of his training supervisors, where the plaintiff claimed that the supervisor "treated [him] in an unprofessional, disrespectful, degrading manner" which he viewed as "forms of intimidation, harassment, and a threat to his job status" (D. Motion, ex. A, at p. 2). The VA claimed that the Plaintiff's reactions constituted "insubordination and a physical threat to a supervisor," and "disrespectful conduct to other employees," (D. Motion, ex. A, at p. 2), and eventually transferred the Plaintiff, on May 31, 1995, to a new level GS-5 position as a Claims Clerk (Pl. Dep., at p. 126).[1]

[1] Subsequent to his transfer, Plaintiff filed a grievance under his collective bargaining agreement seeking reinstatement as an Insurance Phone Specialist trainee. The division chief denied Plaintiff's request, explaining that "[o]ur Mission is to provide quality and timely service to veterans in a professional and courteous manner. As I explained to you and your representative, I do not feel that you would be able to service a veteran in a professional and courteous manner if the veteran challenged you or your work." (D. Motion, ex. A, at p. 3, n.4).

Plaintiff asserts that his reassignment from Insurance Phone Specialist trainee to Claims Clerk was a result of his alleged disability, and in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796. Presently before this Court are: (i) Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Document No. 29, filed July 16, 2002); (ii) Plaintiff's Response to the Motion (Document No. 33, filed September 3, 2002); and (iii) Defendant's Reply in Support of the Motion (Document No. 34, filed September 17, 2002).

II. DISCUSSION

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon a motion for summary judgment, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). An issue is genuine if the evidence is such that a reasonable jury could return a judgment in favor of the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct 2505, 2510, 91 L. Ed. 2d 202 (1986); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 459 (3d Cir. 1989). Lastly, all facts must be viewed in the light most favorable to the non-moving party, and all reasonable inferences should be drawn from the evidence presented by the non-moving party. Anderson, 477 U.S. at 255; Gass v. Virgin Islands Telephone Corp., 311 F.3d 237, 240 (3d Cir. 2002).

The record before this Court reveals that there are no contested material facts pertinent to the relevant inquiry--whether the Plaintiff has a "disability" under the Rehabilitation Act.

Therefore, summary judgment is now appropriate to interpret the application of the facts to the law. See Americans Disabled for Accessible Public Transp. v. Skinner, 881 F.2d 1184, 1191 n.6 (3d Cir. 1989)(interpretation of statutory language is a legal issue for the court). This Court exercises subject matter jurisdiction pursuant 28 U.S.C. § 1331.

The Third Circuit in Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996), articulated a tripartite test to establish a *prima facie* case of discrimination under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-796, by demanding the plaintiff prove: (i) he has a disability; (ii) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (iii) he was nonetheless terminated or otherwise prevented from performing the job. See Gagliardo v. Connaught Laboratories, Inc., 311 F.3d 565, 568 (3d Cir. 2002); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999).

In accordance with 29 U.S.C. § 705(20)(B), the first prong of the Shiring test requires the plaintiff to prove that he has a "disability." Specifically, the plaintiff must prove any one of three disjunctive definitions to qualify as disabled: (i) the plaintiff has a physical or mental impairment which substantially limits one or more major life activities; (ii) the plaintiff has a record of such an impairment; or (iii) the plaintiff is regarded as having such an impairment. 42 U.S.C. § 12102(2); see also Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 193, 122 S. Ct. 681, 689, 151 L. Ed. 2d 615 (2002); Rinehimer v. Cemcolift, Inc., 292 F.3d 375, 380 (3d Cir. 2002).[2] Accordingly, as a precursor to showing a disability under the first definition, the plaintiff

[2] This Third Circuit opinion evaluates the test for a "disability" under the Americans with Disabilities Act ("ADA"), and although we are construing the definition as it applies to the Rehabilitation Act, the elements of the test under the ADA are substantially similar to

must demonstrate the he has a physical or mental impairment that substantially limits a major life activity. Toyota, 534 U.S. at 195.

Three major components must be established to qualify as disabled under the first definition: (i) a physical or mental impairment; (ii) substantially limits; (iii) a major life activity. 42 U.S.C. § 12102(2). As an overlay to the three-prong analysis, this Court is aware that each prong under the first definition of "disability" must be strictly interpreted to maintain a demanding standard under 42 U.S.C. 12102(2). See Toyota, 534 U.S. at 197 ("that these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confirmed by the first section of the ADA"). Furthermore, the Third Circuit has held "only extremely limiting disabilities--in either the short or long-term--to qualify for protected status under the ADA." Marinelli v. City of Erie, Pa., 216 F.3d 354, 362 (3d Cir. 2000).

Under the first prong, a physical or mental impairment is defined as "(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinal; hemic and lymphatic; skin; and endocrine; or (B) any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 45 C.F.R. § 84.3(j)(2)(i); Toyota, 534 U.S. at 194-95. It is generally accepted that carpal tunnel syndrome qualifies as a physical impairment under 45 C.F.R. § 84.3(j)(2)(i), and there is no disagreement among the parties that Plaintiff's carpal tunnel syndrome qualifies as a

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the test under the Rehabilitation Act, and we therefore find this case, and all other binding ADA cases interpreting substantially similar language as in the Rehabilitation Act, to be authoritative.

physical impairment which, at a minimum, adversely affects Plaintiff's musculoskeletal system. See, e.g., Toyota, 534 U.S. at 196 (acknowledging that carpal tunnel syndrome, myotendinitis, and thoracic outlet compression are physical impairments).

Second, the plaintiff must also prove that the physical or mental impairment affects a major life activity. 42 U.S.C. § 12102(2)(A); see also Toyota, 534 U.S. at 195 ("Claimants also need to demonstrate that the impairment limits a major life activity."). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii); see also Toyota, 534 U.S. at 196 ("those activities that are of central importance to daily life"); Bragdon v. Abbott, 524 U.S. 624, 637, 118 S. Ct. 2196, 2206, 141 L. Ed. 2d 540 (1998)(holding that reproduction is a major life activity); Taylor, 184 F.3d at 307 (holding that thinking is a major life activity); Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 185 (holding that standing is a major life activity); Marinelli v. City of Erie, Pa., 216 F.3d at 362-63 (other activities generally necessary for one to life in a sanitary environment are major life activities).

The Plaintiff contends that his carpal tunnel syndrome affects one or more of his major life activities by inhibiting his ability to perform manual tasks and/or to work (P. Resp., at p. 8). Specifically, Plaintiff suffers from significant pain and functional restrictions to his hands and wrists when performing manual tasks requiring manipulation and dexterity, such as writing, grasping, and generally using his arms. (Pl. Dep., at p. 34). Clearly, writing, grasping, and the general use of arms are of central importance in daily life, and must qualify as major life activities under § 12102(2)(A). Working also qualifies as a major life activity. Therefore, this Court concludes that the Plaintiff has validly asserted that a physical or mental impairment limits

one or more of his major life activities, however, Plaintiff must also qualify the degree and severity of his impairment by proving that it *substantially* limits one or more of his major life activities.

The term "substantially" in the first definition of "disability," under 42 U.S.C. § 12102(2)(B), serves as a qualifier, and suggests that impairments with minor affects on major life activities will not suffice under the statute. See Albertson's, Inc. v. Kirkingburg, 527 U.S. 555, 565, 119 S. Ct. 2162, 2168, 144 L. Ed. 2d 518 (1999). The term also reminds the courts that "the determination of whether an individual is substantially limited in a major life activity must be made on a case-by-case basis." Sutton v. United Air Lines, Inc., 527 U.S. 471, 472, 119 S. Ct. 2139, 2141, 144 L. Ed. 2d 450 (1999). This particularized evaluation is especially warranted "where the impairment is one whose symptoms vary widely from person to person." Id. at 199.

In Toyota, the Supreme Court stated that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." 534 U.S. at 198. The inquiry is not "whether the claimant is unable to perform the tasks associated with her specific job." Id. Similarly, in Murphy, the Supreme Court held that an impairment will only substantially limit the major life activity of working, when the plaintiff is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill, and abilities." Murphy v. United Parcel Service, Inc., 527 U.S. 516, 523, 119 S. Ct. 2133, 2138, 144 L. Ed. 2d 484 (1999)(quoting 29 C.F.R. § 1630.2(j)(3)(i)); see also Tice v. Centre Area Transp. Auth., 247 F.3d 506, 512 (3d Cir. 2001). Therefore, to be substantially limited in working, the claimant must be

barred from a broad range of jobs, and not just "one type of job, a specialized job, or a particular job of choice." Sutton, 527 U.S. at 492.

Plaintiff's carpal tunnel syndrome does not substantially limit his ability to perform manual tasks or to work under the Rehabilitation Act. Specifically, the Plaintiff retains the ability to perform a wide-variety of manual tasks requiring the Plaintiff to grasp and generally use his arms, such as: dressing himself (Pl. Dep., at pp. 32, 107-08); cleaning his apartment (Pl. Dep., at p. 108); making himself breakfast and dinner (Pl. Dep., at p. 108); and driving (Pl. Dep. at p. 109). Furthermore, Plaintiff enrolls in one or two classes a semester at Temple University, suggesting that Plaintiff's carpal tunnel syndrome does not substantially limit his ability to write or take class notes (Pl. Dep., at p. 109). Additionally, Plaintiff does not proclaim that he is restricted from performing a wide class of jobs, but rather that his alleged disability specifically prevented him from training as an Insurance Phone Specialist. Clearly, Plaintiff's physical impairment does not substantially affect his ability to work in a broad range or class of jobs.

In conclusion, the intensity, veracity, and frequency of Plaintiff's carpal tunnel syndrome does not rise to the threshold level demanded by the first statutory definition of "disability" under 42 U.S.C. 12102(2)(B). See Toyota, 534 U.S. at 197 ("these terms need to be interpreted strictly to create a demanding standard for qualifying as disabled). For example, Plaintiff stated that the burning sensation from the carpal tunnel syndrome only occurred intermittently and when it did occur, Plaintiff was able to "tough[] it out" (Pl. Dep., at pp. 7, 36). This fact pattern fails to establish a substantial limitation on Plaintiff's ability to perform manual tasks. Furthermore, since Plaintiff's carpal tunnel syndrome does not restrict him from performing a broad range or class of jobs, he is also not substantially limited in his ability to work. Accordingly, the Plaintiff

has not established that he has a physical or mental impairment which substantially limits one or more major life activities under the first definition of disability under the Rehabilitation Act.

However, the Plaintiff can also establish that he is "disabled" by proving he has either "a record of such an impairment" or is "regarded as having such an impairment." 42 U.S.C. § 12102(2). Since the Plaintiff does not claim that he has a record of such an impairment, this Court will proceed to analyze whether the Plaintiff is "regarded as" being disabled.[3] A plaintiff can be "regarded as" being disabled, in two ways: (i) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities; or (ii) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." Sutton, 527 U.S. at 489. Both definitions require that the

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[3] The Defendant alleges that since the Plaintiff never claimed he was "regarded as" being disabled in the administrative process, he failed to exhaust his administrative remedies, and therefore may not bring a claim based upon the "regarded as" theory. "'The relevant test in determining whether appellant was required to exhaust her administrative remedies . . . is whether the acts alleged in the subsequent . . . suit are fairly within the scope of the prior EEOC complaint, or the investigation arising therefrom.'" Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996)(quoting Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). Generally, a claim will only be dismissed for failure to exhaust administrative remedies when a plaintiff alleges a category of discrimination, such as racial or gender discrimination, in the subsequent suit that was not alleged in the administrative complaint. See, e.g., Antol, 82 F.3d at 1291 (gender discrimination claims resulted in a dismissal for failure to exhaust administrative remedies where the plaintiff's administrative complaint only asserted disability discrimination). In Plaintiff's case, there was no EEO investigation, so the scope of the Plaintiff's claims in the present suit are confined by the scope of Plaintiff's administrative complaint. Plaintiff's administrative complaint alleged, among other things, that he believed "the reassignment is discriminatory based on my disability (repetitive motion disorder)." (D. Reply, ex. E, at p. 3). This allegation is specific enough to preclude the Plaintiff from asserting a discrimination claim based upon race, gender, religion, etc., but it is also general enough to encompass all of the three possible definitions of a disability as defined by 42 U.S.C. § 12102(2). This Court is satisfied that the Plaintiff has exhausted his administrative remedies for this particular claim.

employer has some misconceptions about the individual. Specifically, the employer must believe either that "one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." Id.

The crux of the requirements under the "regarded as" theory is that the *employer* mistakenly believes that the employee is *substantially* limited. Reiterating, to be substantially limited in the major life activity of working, the plaintiff must be restricted from performing a broad range or class of jobs, as a result of a physical or mental impairment. Murphy, 527 U.S. at 523. To be substantially limited in performing manual tasks, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Toyota, 534 U.S. at 198. Therefore, the relevant inquiries are: (i) whether the employer believed that the plaintiff's impairment precluded the plaintiff from a broad range or class of jobs; and (ii) whether the employer believed that the plaintiff's impairment prevented or severely restricted the plaintiff from doing activities that are of central importance to most people's daily lives.

This dispute arose when the VA transferred the Plaintiff from a position as an Insurance Phone Specialist trainee to a Claims Clerk--a position requiring the Plaintiff to "process all death claims for life insurance, [and to make] sure that the figures are on the system correctly." (Pl. Dep., at p. 128). The Plaintiff claims that he was transferred because he was "regarded as" disabled by the VA. However, the transfer itself tells a different story. The transfer indicates that the VA did not think that the Plaintiff's impairment substantially limited him from working, i.e., performing a broad range or class of jobs. Specifically, an Insurance Phone Specialist and a Claims Clerk are both within the same class of jobs, and therefore the VA could not have thought

that the Plaintiff's disability prevented him from performing any job within that particular class. Additionally, Plaintiff held the position as a Claims Clerk for seven years, leading to a promotion in 2000 to the GS-6 level (Pl. Dep., at p. 127), indicating that Plaintiff's transfer was not merely a pretext in an effort to slowly remove Plaintiff from a broad range or class of jobs on account of his physical impairment.[4]

Furthermore, the employer did not believe that Plaintiff's carpal tunnel syndrome substantially limited Plaintiff's ability to perform manual tasks. In fact, Plaintiff's transfer from Insurance Phone Specialist to Claims Clerk suggests just the opposite; the VA had full faith in the Plaintiff's ability to perform manual tasks. A Claims Clerk is likely to spend more time performing manual manipulations--typing--than an Insurance Phone Specialist, who spends more time talking to potential clients over the telephone. Therefore to suggest that the VA discriminated against the Plaintiff because the employer thought that Plaintiff's impairment

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[4] The Plaintiff submitted a Proposed Separation-Disability Notice, sent by the VA to the Plaintiff, dated July 17, 2002, to support the Plaintiff's theory that the VA regarded the Plaintiff as being disabled. Specifically, the letter states, "The position you encumber is a full time position. It requires your presence on a regular and continuing basis, 40 hours a week, eight hours a day, Monday through Friday. You are unable to safely satisfy such requirements and have been unable to report to work due to your permanent medical/physical limitation. Consequently, I am left with no alternative other than to propose your separation from the service" (P. Resp., ex. C, at p. 1). The letter conclusively indicates that the VA regards the Plaintiff as being disabled, however, for purposes of our evaluation in this particular case, the relevant time period is not July 2002, but rather *May 1995*, when the Plaintiff was transferred from Insurance Phone Specialist trainee to Claims Clerk. If the letter was sent in 1996, or possibly even as late as 1997, the Court would most likely consider it in evaluating the VA's motive in transferring the Plaintiff, but we highly doubt that the VA retained the same motives against the Plaintiff over a *seven year period.* See Carcia v. Federal Express Corp., 2001 WL 323233 at *2 (E.D. Pa. April 3, 2001)("it is only relevant whether FedEx regarded him as so limited when it made the decision to fire him."). Therefore, the letter will not be taken into consideration.

substantially limited his ability to perform manual tasks, notwithstanding the fact that Plaintiff was transferred to a position where the quintessential function of the job is to performing manual tasks, is illogical. Nevertheless, the Plaintiff has failed to tender any evidence as to the pivotal issue: did the VA believe that the Plaintiff could not perform manual tasks that are of *central importance to most people's daily lives*? See Cade v. Consolidated Rail Corp., 2002 WL 922150 at *11 (E.D. Pa. May 7, 2002)("Examples of the types of tasks that are considered of central importance to people's daily lives include household chores, bathing, and brushing one's teeth."). This Court recognizes the dramatic distinctions between the inability to perform manual tasks required for a particular job, and the inability to perform manual tasks considered to be of central importance to most people's daily lives. However, even if the VA thought that the Plaintiff's impairment restricted Plaintiff from typing, which the VA did not, the impairment would still not qualify as a substantial impairment unless typing is considered to be a manual task of central importance in most people's daily lives.

In conclusion, the Plaintiff has failed to allege that the VA regarded his carpel tunnel as an impairment that substantially limited Plaintiff in the major life activity of working. A position as Insurance Phone Specialist trainee is only a single and particular job, and not a class or broad range of jobs, so the impairment, by definition, does not *substantially* limit Plaintiff in the life activity of working. See, e.g., Sutton, 527 U.S. at 493 (in evaluating the affect of a visionary impairment on a pilot's ability to fly commercial aircraft the court stated that "'an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working."(citation omitted)). Plaintiff was precluded from only one

specific job, Insurance Phone Specialist trainee, and was transferred to a similar job, in the same industry, with the same employer. Furthermore, this Court opines that the Plaintiff's transfer was totally irrespective of Plaintiff's alleged disability, but rather, based upon Plaintiff's apparent inability to maintain a civil relationship with his training supervisor and his poor performance in training sessions.[5] See also Kelly v. Retirement Pension Plan, 209 F. Supp. 2d 462, 476-77 (E.D. Pa. 2002)(holding that employee's poor performance and the supervisors' personal animosity, favoritism, and cronyism were legitimate, non-discriminatory reasons for terminating the employee.). Lastly, Plaintiff has also failed to assert evidence suggesting that the VA believed the Plaintiff's carpal tunnel syndrome substantially limited the Plaintiff's ability to perform manual tasks of central importance to most people's daily lives, and therefore the Plaintiff has not successfully alleged that the VA regarded him as being disabled as defined by the Rehabilitation Act.

III. CONCLUSION

Based on the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**. An appropriate order follows.

BY THE COURT:

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Legrome D. Davis, U.S.D.J.

[5] The Insurance Phone Specialist trainees were required to take a series of six tests, and to maintain a 70 average over any group of three consecutive tests. However, the Plaintiff admitted to receiving three 69s in a row: on the second, third and fourth tests.

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JAMES F. VAN HOUTEN, Plaintiff,	:	CIVIL ACTION
v.	:	NO. 98-CV-0270
HERSHEL GOBER, Acting Secretary, Department of Veteran Affairs.	:	

ORDER

AND NOW, this day of June, 2003, upon consideration of: (i) Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Document No. 29, filed July 16, 2002); (ii) Plaintiff's Response to the Motion (Document No. 33, filed September 3, 2002); and (iii) Defendant's Reply in Support of the Motion (Document No. 34, filed September 17, 2002), it is hereby **ORDERED** that Defendant's Motion is **GRANTED**. This is a final legal adjudication. The Clerk of Court is directed to statistically close this matter.

BY THE COURT:

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Legrome D. Davis, U.S.D.J.